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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 542

ELIZABETH ARDEN SALES CORPORATION,
PETITIONER AND APPELLANT BELOW,
vs.
GUS BLASS COMPANY, RESPONDENT
AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION.

TO THE HON. HARLAN F. STONE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In an action for alleged violation of the Clayton Act as amended by the Robinson-Patman Act, tried without a jury,

the Petitioner was found to have violated Sec. 2 (d) and (e), 49 Stat. 1526, 15 U.S.C.A. § 13 (d) and (e) and under 15 U.S.C.A. §15, 38 Stat. 731, was held liable for three-fold the damages claimed. (R. 79) The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 114) and denied rehearing on September 12, 1945 (R. 133). The essential facts both as to violation and damage were undisputed.

The Sub-sections of said Act involved respectively provide:

> "(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."
>
> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

As to violation the question is whether or not Petitioner dealt with Respondent and M. M. Cohn Company, a competitor of Respondent, on proportionally equal terms.

Respondent and M. M. Cohn Company are department stores in the City of Little Rock, Arkansas, each having a cosmetic department. Petitioner sold its cosmetic products, hereinafter called "Arden products" to each of said stores in interstate commerce. Respondent became a retail outlet for Arden products commencing in August, 1938, (R. 42) and continued to handle the line through August, 1940,

(R. 42). M. M. Cohn Company had theretofore exclusively retailed Arden products in Little Rock since 1920 (R. 69). For many years it had been the practice of cosmetic companies to furnish to their retail outlets what is known as "demonstration" (R. 45). A sales girl is selected to become the demonstrator of a particular line of cosmetics and receives some special training (R. 40). The use of demonstrators originated with some enterprising salesman in order to get for his line more favorable quality and quantity of sales (R. 40). This proved effective; consequently, other lines of cosmetics had to furnish demonstrators (R. 40). A demonstrator is not allowed to use unfair tactics and must sell the product requested by a customer although it be a competitive line, but if the customer has no preference, the demonstrator will endeavor to introduce her own line. There is also the idea that the demonstrator shall advertise her line by suggesting it to customers who come to the cosmetic counter for toothpaste, etc. (R. 40)

Petitioner paid the Respondent one half the salary of the Arden demonstrator in its store, which payment amounted to $10 per week (R. 75). Petitioner paid the full salary of $20 per week of the Arden demonstrator in the M. M. Cohn Company store (R. 75). Petitioner contended that measured by the tangible yardstick of volume of purchases, it treated Respondent and its competitor, M. M. Cohn Company, with proportionate equality.

By calendar year the net purchases were:

1938		
Gus Blass Co. (commencing in August)	$5,117.78	(R.67
M. M. Cohn Company (entire year)..	9,705.90	(R.69)
1939		
Gus Blass Company	4,045.74	(R.67)
M. M. Cohn Company.....	9,210.03	(R.69)
1940		
Gus Blass Company (through August)	$1,975.30	(R.67)
M. M. Cohn Company (through August)	5,548.54	(R.69).

Because Respondent did not commence its operation with Petitioner until August, 1938, whereas M. M. Cohn Company had dealt with Petitioner during that entire calendar year, discussion here of the legal situation for 1938 would involve argumentative matters. Comment for such period is, therefore, reserved for the supporting brief. It may be appropriate now to point out that the question as to violation of the Act during 1938 presents a difficult point on which there is no precedent.

The records of purchases by Respondent and M. M. Cohn Company appear at pages 67 and 69, respectively, of the record. Calculations therefrom show during 1939 the cost to Petitioner of demonstration to Respondent was 12% of Respondent's net purchases. This was equivalent to a refund to Respondent of $12 on every $100 net purchase, so that during 1939 Respondent actually received $100 worth of merchandise for $88.

A similar calculation as to M. M. Cohn Company for such year shows the cost to Petitioner of the demonstration to be 11%. This was equivalent to a refund to Cohn of $11 on every $100 net purchase so that Cohn received $100 worth of merchandise for $89, although it purchased more than twice as much as Respondent.

Had Respondent received a full demonstration of $20 a week during that year, the cost to Petitioner would have been 24% so that Respondent would have received $100 of merchandise for $76 at the time its competitor Cohn was paying $89 and buying more than twice as much.

Similar calculations through August, 1940, after which Petitioner no longer dealt with Respondent, show the cost of demonstration to Respondent was 16%, and the cost of demonstration to Cohn was 10%. So that a full demonstration to Respondent would have cost Petitioner 32% of Respondent's net purchases, equivalent to a refund of $32 on every $100 net purchase, while Cohn, which bought almost three times as much, got a refund of $10 on every $100 net purchase.

If the period of Respondent's operation be viewed in the aggregate, calculations as set out in the supporting brief show Respondent purchased 37.6 per cent of the total merchandise bought by it and Cohn, and received 33⅓ per cent of the total demonstration paid, which is submitted to be substantially proportionate equality. But damages representing the mere difference between $20 and $10 per week for 101 weeks were allowed as though Respondent had purchased 50 per cent of the total merchandise.

Thus, there is presented another question of first impression—how is "proportionate equality" determined?

In November and December of 1940 Respondent turned over and M. M. Cohn Company purchased from it the Arden merchandise which Respondent had on hand of the value of $2,463.04 (R. 42, 67, 69), which exceeded its purchases for that year.

There was no evidence at all as to what was said between the parties at the time the arrangement was made for Respondent to handle Petitioner's products. The arrangement was made between a representative of Respondent who died in 1939, prior to the trial, (R. 38, 46) and a representative of Petitioner who at the time of the trial was employed by another cosmetic manufacturer (R. 54) and who was not called as a witness. The record is, therefore, silent as to whether or not it was made known to Respondent that under certain circumstances it could obtain from Petitioner a full demonstration and if so, what those circumstances were, or whether the payments were based on volume.

The opinion of the Circuit Court of Appeals was that because the agreement between Petitioner and Respondent did not relate the payments to Respondent to volume or anything else, and because there was no way under the agreement for Respondent to qualify for a full demonstration, the contract was at its inception a violation of said sub-sections (d) and (e) (R. 95, 106). The opinion was

further that volume not having been made the basis of the payments in the beginning, it could not thereafter be used to justify the difference in treatment (R. 106-107).

Petitioner filed in the Circuit Court of Appeals its petition for rehearing, showing among other things that the record was utterly silent as to just what the arrangement was, and that if the case be made to turn upon the initial contract between the parties, the Respondent had failed to carry the burden of proof of showing same to be unlawful, since no evidence was introduced on that phase of the case (R. 115). The petition for rehearing was denied without opinion (R. 133).

As to damages, the complaint did not allege (R. 3), nor the evidence show, any loss of business or injury to the business of Respondent. The sole damage claimed was the difference between the amount paid Respondent and the amount paid by its competitor, M. M. Cohn Company, which difference was, of course, $10 per week (R. 3). This measure of damages was allowed in both courts for 101 weeks, and under 15 U.S.C.A. § 15, 38 Stat. 731, was trebled (R. 79). The record reflects that both Respondent and its competitor Cohn sold the merchandise in question to the retail trade at the same price under Fair Trade Agreements (R. 77) so that the alleged discrimination was not and could not be translated into a competitive weapon. Petitioner unsuccessfully contended below that the payment of $20 a week to the competitor being a gain to the competitor but not a loss to Respondent, the latter, therefore, suffered no damage as that term is known to the law, and consequently was not entitled to recover under a presumptive measure of damages, especially in view of the fact that such a measure was offered in Congress but stricken from the bill as passed.

Finally, Petitioner unsuccessfully contended below that if a presumptive measure of damages be allowed, measured by the amount in dollars and cents that proportionate

equality was lacking, then in view of the volume of sales, it necessarily follows that proportionate equality was not lacking to the extent of $10 a week, for each calendar year, nor for the entire period, viewed in the aggregate.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The case is one of first impression. Decisions which have touched upon sub-sections (d) and (e) have done so in conjunction with the larger issues presented by sub-section (a). But sub-section (a) is not in this case. Here there is involved only sub-sections (d) and (e) of the Robinson-Patman Act which have to do with "proportionate equality". Consequently, the Circuit Court of Appeals has decided an important question of Federal law which has not been decided by any other Court and which should be settled by this Court. The use of "demonstrators" is nation-wide and industry-wide. (R. 40) It comes under the meaning and intent of the Robinson-Patman Price Discrimination Act just as much as booking practices, basing point system of freight charges, and advertising allowances considered by this Court in

Corn Products Refining Company v. *Federal Trade Commission*, ... U.S. ...., 65 S. Ct. 961, decided April 23, 1945, and

Federal Trade Commission v. *A. E. Staley Manufacturing Company*, ... U.S. ...., 65 S. Ct. 971, decided on the same day.

B. The Circuit Court of Appeals has decided another important question of Federal law which has not been decided by any other Court and which should be settled by this Court, namely: That actual difference in volume will not be a defense in a suit for violation of Sub-sections (d) and (e) unless the defendant affirmatively shows that payments made were at the outset agreed and understood to be based upon volume. Thus, that liability for damages

may be predicated upon the making of a contract unlawful under the Act, and not upon damages ensuing therefrom.

C. The Circuit Court of Appeals either inadvertently assumed the contract in the beginning was not based upon or related to volume and that it provided no competitive way for Respondent to get a full demonstration, or the Court put the burden on Petitioner to prove the contract in its inception was unlawful. The question of the burden of proof in a civil suit involving Sub-sections (d) and (e) of the Robinson-Patman Act is one which has not been decided by any other Court and should be settled by this Court.

D. The question as to how proportionate equality is judicially determined when, as happened here, a complaining party commences its operation in the middle of a calendar year and has a competitor which has handled the merchandise over a long period of time so that there is no yardstick by which volume of the complaining party may be determined at the outset, except by its potential, is one which has not been but should be settled by this Court.

E. The great importance of the statute to the business world and the legal profession and the need of an authoritative and elucidating decision defining "proportionate equality" and also deciding the equally important question as to whether the amount of an alleged price discrimination is, without more, recoverable under the Robinson-Patman Act which contains no provision for damages in a civil suit.

F. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court, namely: In determining damages under statutes prohibiting discriminations, this Court has uniformly held that the amount of discrimination without more is not recoverable as damage, and that the only dam-

ages recoverable are those known to and recognized by the law.

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U.S. 184;

Interstate Commerce Commission v. *United States ex rel. Campbell, et al.*, 289 U.S. 385.

The statutes involved in those cases demanded equality of treatment. Sub-sections (d) and (e) have the same purpose except they demand "proportionate equality". The Robinson-Patman Act, as did the statutes involved in the cases cited, provides for criminal sanctions and the exercise of corrective power by a quasi-judicial tribunal. Moreover, allowance of a sum representing the difference in refunds or payments and then trebling same aggravates the very discrimination which the statute was designed to prevent, which is what this Court condemned in the cases cited. Again, this Court has uniformly held in a suit for damages under the Anti-Trust statutes it is requisite to recovery that both violation and the fact of damage be proved, and that those damages be such as the law recognizes.

Keogh v. *Chicago and N. W. Railway Company, et al.*, 260 U.S. 156.

Petitioner respectfully urges that the application of a presumptive measure of damages in this case, absent loss of business, absent loss of profits, absent injury to business, is in conflict with the decisions of this Court noted hereinabove.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its Docket No. 12,897, Civil,

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to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 10th day of October, 1945.

ELIZABETH ARDEN SALES CORPORATION,

By J. Howard Carter,
A. W. Dobyns,
A. F. House,
Counsel for Petitioner.

J. W. BARRON,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is not officially reported but may be found at page 95 of the record, and the dissenting opinion at page 112.

II.

1. The date of the judgment to be reviewed is July 31, 1945 (R. 114). The petition for rehearing was denied without opinion on September 12, 1945 (R. 133).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended. 28 U.S.C.A. 347.

3. Cases believed to sustain said jurisdiction are:

Corn Products Refining Co. v. *Federal Trade Commission,* .... U.S. ...., 65 S. Ct. 961, decided 4/23/45;

Federal Trade Commission v. *A. E. Staley Mfg. Co.,*.... U.S. ...., 65 S. Ct. 971, decided 4/23/45.

III.

STATEMENT OF THE CASE.

The statement set forth in the preceding Petition is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Court erred in holding Petitioner violated 15 U.S.C.A. § 13 (d) and (e).

2. The Court erred in holding and declaring the contract for demonstration to Respondent in its inception did not relate payments to Respondent to volume and did not provide a competitive way for Respondent to receive full demonstration.

3. The Court erred in holding in effect that the burden was on Petitioner to show the contract at its inception did relate payments to volume and did provide a competitive way for Respondent to get a full demonstration.

4. The Court erred in holding that volume may not be considered in determining what constitutes "proportionate equality" under said sub-sections (d) and (e) when the contract for payments did not provide or set up any basis for determining or graduating the payments.

5. The Court erred in allowing any damages to Respondent.

6. The Court erred in holding that "proportionate equality" was lacking to the extent of $10 per week, during the entire period Petitioner did business with Respondent.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point 1: The Court Erred In Holding Petitioner Violated Sub-Sections (d) and (e).

A. Measured by volume, proportionate equality existed between Respondent and its competitor Cohn during the calendar years 1938 and 1939 and throughout the period of Respondent's operation during 1940.

Point 2: The Court Erred In Holding And Declaring The Contract For Demonstration To Respondent At Its Inception Did Not Relate Payments To Volume and Did Not Provide A Competitive Way For Respondent To Receive A Full Demonstration.

A. There is no evidence in the record as to what the terms of the contract were. The presumption is that it was a lawful contract.

Hazen v. *Henry,* 6 Ark. 86;

Sharp v. *Johnson,* 22 Ark. 79;

Lavender v. *Huggins,* 32 Ark. 763;

Excelsior Mfg. Co. v. *Owens,* 58 Ark. 556; 25 S.W. 868;

U.S.F. & G. v. *Bank of Batesville,* 87 Ark. 348; 112 S.W. 975;

State, ex rel. Atty. General v. *Broadaway,* 192 Ark. 634; 93 S.W. (2nd) 1248.

Point 3: The Court Erred In Holding In Effect That The Burden Was On Petitioner To Show The Contract At Its Inception Was Lawful.

A. Since Respondent attacked the arrangement as being unlawful, the burden, of necessity, was upon Respondent to prove the terms thereof.

Point 4: The Court Erred In Holding That Volume May Not Be Considered In Determining What Constitutes "Proportionate Equality".

A. The effect of disregarding volume is to hold Petitioner liable for the mere making of the assumed unlawful contract in disregard of what was actually done by the parties.

B. Since Respondent never approached the volume of its competitor Cohn, it is unimportant whether or not it would have received a full demonstration had it done so.

Point 5: The Court Erred In Allowing Any Damages To Respondent.

A. The mere difference in rebate without more is not the measure of damages for unlawful discrimination.

Pennsylvania Railroad Company v. *International Coal Mining Company,* 230 U.S. 184; 33 S. Ct. 893; 37 L. Ed. 1446;

Interstate Commerce Commission v. *U.S. ex rel. Campbell, et al.,* 289 U.S. 385; 53 S. Ct. 524; 77 L. Ed. 1467.

Point 6: The Court Erred In Holding "Proportionate Equality" Was Lacking To The Extent Of $10 Per Week.

A. Damages assessed at the rate of $10 per week must be predicated upon the assumption that Respondent was entitled to a full demonstration of $20 per week, the same as its competitor Cohn received throughout the entire period; but Cohn, by reason of its volume of purchases, earned the difference in each of the calendar years involved.

POINT 1.

The Court Erred in Holding Petitioner Violated Subsections (d) and (e).

This phase of the case is one of first impression. The impact of the sections of the Act here involved is nation-wide.

Both sub-sections 13 (d) and (e) demand "proportionate equality", not "equality". Some difference in treatment is expressly allowed. An illustration of "proportionately equal terms" was given in the Senate at the time of the passage of the bill, by Senator Logan who was in charge of the bill. Thus,

> "Mr. Costigan: May I ask whether the expression 'proportionately equal terms' has been judicially interpreted and if not what construction is placed upon it by the Senator from Kentucky?
>
> "Mr. Logan: I do not think it has been judicially construed. But if the seller grants an advertising allowance to one customer there is no reason why he should not grant, under identical circumstances, the same allowance to another customer based upon the quantity of the purchases. If one man buys $100,000 in goods and should be allowed $1,000 for advertising purposes, and another buys $10,000 in goods, he ought to be allowed $100 for advertising. That is not prohibited by the bill. So long as the same advertising allowances are made proportionately on the amount of purchases there is no prohibition in the bill against them. The bill does not prohibit anything except those purchases which tend to destroy competition and bring about monopoly. That is all the bill does."
>
> Vol. 80, Congressional Record, p. 3231.

Demonstration is one phase of advertising. One important function of the demonstrator is to suggest or advertise her line to a customer who has no preference or who seeks an item other than cosmetics. (R. 40)

Purchases were:

1938		
Respondent (Commencing in August)	$5,117.78	(R. 67)
M. M. Cohn Company (Entire Calendar Year)	9,705,90	(R. 69)
1939		
Respondent	4,045.74	(R. 67)
M. M. Cohn Company	9,210.03	(R. 69)
1940		
Respondent (through August)	$1,975.30	(R. 67)
M. M. Cohn Company (through August)	5,548.54	(R. 69)

Based upon volume, Cohn earned substantially twice as much demonstration as Respondent for the calendar year 1938, and more than twice as much during each of the two succeeding years.

In 1939 at $10 a week demonstration to Respondent and $20 a week to M. M. Cohn Company, the cost of the demonstrations to Petitioner was 12% of Respondent's net purchases and 11% of M. M. Cohn Company's net purchases. This was equivalent to a rebate to Respondent of $120 on every $1,000 net purchase and to a rebate to Cohn of $110 on such purchase. Demonstration at $20 a week to Respondent would have represented a rebate of $240 on every $1,000 net purchase during 1939.

The total net purchases of Respondent and the Cohn Company for 1939 aggregated $13,255.77. Petitioner purchased 30% of the total but received 33⅓% of the total fund allowed for demonstration. It got more than its proportionate share of that fund. For 1939 Cohn bought 70% of the total merchandise but received only 66⅔% of the total demonstration fund. What there was lacking in proportionate equality was in favor of Respondent.

In 1940, through August, after which dealings with Respondent ceased, the cost of the demonstration to Petitioner was 16% of Respondent's net purchases and slightly over 10% of M. M. Cohn Company's net purchases. The re-

bate represented by demonstration to Respondent was $160 on every $1,000 net purchase and to Cohn $110 on such purchase. A full demonstration of $20 a week to Respondent would have been tantamount to a rebate to it of $320 on every $1,000 net purchase. Moreover, in 1940, through August, total net purchases of both stores aggregated $7,523.84. Respondent purchased 26% of the total but received 33⅓% of the entire demonstration which was more than its proportionate share thereof. M. M. Cohn Company purchased over 73% of the total but received 66⅔% of the total fund allowed for demonstration.

In 1938 the legal situation is perplexing. Cohn had exclusively handled the Arden merchandise since 1920 (R. 69). Respondent became a distributor in August of 1938. Its opening order was large in order to obtain a representative stock (R. 42). The question is whether the law will view the transactions in 1938 commencing with August or will the law also take into account Cohn's purchases during such entire calendar year. As to old accounts, the seller has a yardstick of past performance in the form of volume. As to a new account he has no measure other than the store's potential. He has also to consider the important factor of cost of demonstration. Only this Court can finally point the way for merchants to follow in relating new accounts to old established ones so as to achieve proportionate equality under the Robinson-Patman Act.

In the next place, if it be said that Respondent got the worst of it from August, 1938, until the end of that year, it is equally true that Respondent got much the best of it in 1939 and 1940. Finally, when viewed as a whole, Respondent was treated substantially with proportionate equality. Thus, the total purchases at the two stores during the period of Respondent's operation was:

Respondent	$11,250.55
M. M. Cohn Company	18,593.40
Total	$29,843.95

Of this total, Respondent purchased 37.6% and received 33⅓% of the demonstration paid. If the merchandise of the value of $2,463.04, which was turned over by Respondent to Cohn Company in November and December of 1940 (R. 42) be deducted, then the total net purchases of Respondent were but $8,751.51 as contrasted to the total net purchases of Cohn amounting to $18,593.40.

It is submitted that if there was any possible violation of the Act, it was merely for the calendar year 1938 commencing in August, whereas damages were allowed at the rate of $10 a week and trebled for the entire calendar year of 1939 and through August of 1940, a total of 101 weeks. (During this period Respondent discharged the demonstrator and did not replace her for several weeks, which accounts for the 101 weeks used to calculate damages (R. 47-48).

POINT 2.

The Court Erred in Holding and Declaring the Contract for Demonstration to Respondent at its Inception Did Not Relate Payments to Volume and Did Not Provide a Competitive Way for Respondent To Receive a Full Demonstration.

Petitioner's calculations were disregarded by the Circuit Court of Appeals on the ground that the evidence did not show payments for demonstration ever had any established or determinable basis or standard, that the allowance had been fixed at the time operations commenced, and there it simply remained; the amount was arrived at by negotiation, and there was no arrangement or provision for graduating it to the amount of goods purchased during any given period (R. 106-107). In the petition for rehearing it was pointed out that there was no evidence in this record as to what the terms of the contract with Respondent were, and that there was no evidence that:

1. Payments to Respondent and Cohn Company were not based upon volume.

2. The way to get a full demonstration was not made known to Respondent at the outset.

3. Regardless of how much Respondent purchased, it could never get a full demonstration (R. 115).

Noland Blass, president of Respondent, testified he did not handle or participate in the discussions with Petitioner's representative leading up to the transaction of business between them, and that he had no part in making the arrangement or agreement. Thus, he said,

> "When the Blass Company began buying Elizabeth Arden products, I approved the opening order but did not take part in the negotiations which preceded this order. Mr. Johnson was general manager or sales manager of Elizabeth Arden (R. 38). * * * I did not handle the negotiations with Arden prior to the opening order. My brother, who died in 1939, personally handled it in New York." (R. 46).

Petitioner's general manager Johnson was succeeded by Carlson (R. 41). Carlson was in military service abroad at the time of the trial (R. 52) while Johnson was with another cosmetic manufacturer (R. 54). There was no testimony from anyone as to just what the terms of the contract were. The presumption is that it was a lawful contract.

Hazen v. *Henry*, 6 Ark. 86;

Lavender v. *Huggins*, 32 Ark. 763;

Excelsior Mfg. Co. v. *Owens*, 58 Ark. 556; 25 S.W. 868;

U. S. F. & G. v. *Bank of Batesville*, 87 Ark. 348; 112 S.W. 975;

State, ex rel. Atty. General v. *Broadaway*, 192 Ark. 634; 93 S.W. (2nd) 1248.

The testimony of ex-general manager Johnson was just as available to Respondent as it was to Petitioner. If the case be made to turn upon the terms of the initial contract or understanding, Respondent has failed to carry

the burden of proof. If the case be made to turn upon what actually was done in the situation, then what was done resulted in Respondent's having actually received substantially proportionate equality.

POINT 3.

The Court Erred in Holding in Effect That the Burden Was on Petitioner To Show the Contract at its Inception Was Lawful.

As stated, the petition for rehearing pointed out the utter absence of evidence as to what the terms of the contract were (R. 115). The petition for rehearing was overruled without opinion (R. 133). Since there was no evidence on the subject, it must have been that the Circuit Court of Appeals held the burden was on Petitioner to show the contract was lawful. Petitioner urges that since Respondent is the one who attacked the arrangement as being unlawful, the burden was upon Respondent to prove the terms thereof.

POINT 4.

The Court Erred in Holding That Volume May Not Be Considered in Determining What Constitutes "Proportionate Equality".

Petitioner suggests that what the parties actually did is of more importance to the law than what they said they would do. Their actions, as we have shown, resulted in Respondent's having been treated with proportionate equality. Without question, it did exist throughout 1939 and 1940, if volume be of any consequence, and of all of the factors which might enter into the problem, can anyone suggest a more certain yardstick than volume? It is not hypothetical, nor is it artificial. It is concrete, definite, and certain. The effect of disregarding volume is to hold Petitioner liable in damages for the mere making of the supposed unlawful contract in disregard of what they did. The undisputed fact is that for the calendar year 1938, M. M. Cohn Company purchased almost twice as much as

Respondent and for each of the calendar years 1939 and 1940 purchased substantially more than twice as much. Respondent, therefore, never earned payment for demonstration equal to the amount paid Cohn. A different situation would have been presented had the purchase of the two stores been the same or substantially the same. Then and only then would it be appropriate for the courts to go into the question of whether or not Respondent could have obtained as much demonstration as its competitor got. What is real, and therefore important, is that Respondent's volume did not equal or approximate that of its competitor. It is urged that upon the legal questions as to violation the authoritative decision of this court is needed to settle an important branch of Federal law.

DAMAGES.

POINT 5.

The Court Erred in Allowing any Damages to Respondent.

It is submitted that the decision of the Circuit Court of Appeals as to damages conflicts with applicable decisions of this Court. Both stores sold at the same retail price fixed by Petitioner. (Admission of Fact No. 2, R. 7; Finding of Fact No. 18, R. 77). No loss of business or injury to business was alleged in the complaint (R. 3) nor proved at the trial. Damages were predicated upon the mere difference in allowance for demonstration. Upon the District Court's finding that,

> "* * * the discrimination against the plaintiff * * * amounted in dollars and cents to the sum of $10 per week for 101 weeks or a total of $1,010" (R. 77).

and the further finding that had Petitioner paid Respondent a full demonstration,

> "The cost of the operation of plaintiff's cosmetic department during that period of time would have been reduced at the rate of $10 per week or an aggregate of $1,010" (R. 78).

the Circuit Court of Appeals in a dividend opinion affirmed the judgment for triple the alleged damages.

The applicable statute concerning damages is:

> "Any person who shall have been injured in his business or property by reason of anything forbidden in the Anti-Trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of the controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731, 15 U.S.C.A. § 15.

The contention of Respondent in short was that it would have been $10 a week better off had it received a full demonstration for 101 weeks; but in *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U.S. 184; 33 S. Ct. 893; 37 L. Ed. 1446, plaintiff shipper had received certain rebates from the defendant carrier and when it found that others had received greater rebates brought suit under Sec. 8 of the Act to Regulate Commerce, which gave a right of action for damages and attorney's fees "to the person injured" by reason of discrimination. The damages claimed were the difference in rebates. The Act to Regulate Commerce, as the Court noted, contained provisions for criminal liability and so does the Robinson-Patman Act, and the latter also provides for the intervention of the corrective power of the Federal Trade Commission. This Court held that the plaintiff in the Pennsylvania Railroad Company case could not recover since the measure of damages was not merely the amount of the discrimination. This Court said:

> "We are cited to no authority which shows that there was any such ancient measure of damages and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, * * *" (Opinion, pp. 200, 201).

> "The statute gives a right of action for *damages to the injured party* and by use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injuries sustained. It is elementary that in a suit at law both the fact and the amount of damage must be proved." (Opinion, p. 204).

The case just discussed is important for another reason. The Act to Regulate Commerce, as introduced, contained a provision making the unlawful rebate the measure of damages, but this provision was omitted from the Act as passed. This Court said the fact of its omission was not only significant but "conclusive against the contention of the plaintiff". (Opinion, p. 198). The Robinson-Patman bill as introduced in Congress also contained a provision setting up a presumptive measure of damages measured by the amount of the discrimination. Thus, Sec. (d) of the proposed Act stated:

> "For the purposes of suit under Sec. 4 of this Act, the measure of damage for any violation of this section shall in the absence of proof of greater damage be presumed to be the unit amount of the prohibited discrimination payment or grant concerned, multiplied by—* * *" (Report of the House Judiciary Committee No. 2287, 74th Congress).

The Report of the Senate Judiciary Committee offered an amendment on the measure of damages as follows:

> "(d) For the purposes of suit under Sec. 4 of this Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation; limited, however,—* * *". (Report No. 1502, 74th Congress).

The same Senate Report in discussing the measure of damages goes on to say that its purpose is to enable those discriminated against "* * * to restore themselves through the recovery of damages to the equal position which they

would have occupied had the violation not been committed."

Although the provision for the presumptive measure of damages was omitted from the bill as passed, the result of the decision of the majority of the Circuit Court of Appeals is to set up such a measure. Thus, the majority opinion, after noting that the purpose of the Robinson-Patman Act is to require proportionate equality, stated:

> "What the seller is thus both permitted and commanded to do, we can see no sound reason under the language or policy of the statute for not compelling him to do by an action for general damages, where such damages have been directly suffered and are plainly measurable.' (R. 110) "* * * To relieve the seller of the obligation to equalize such a discrimination through readily determinable general damages, where no special damages exist or are claimed, would be to weaken the effectiveness of the statute in compelling obedience to its commands." (R. 111).

We submit that the denomination of the alleged amount of the discrimination or refund as general damages is not a permissible transition. Call that amount what you will, there remains the indisputable fact that no loss of business was sustained and no injury to Respondent's business suffered. As the dissenting opinion so aptly points out, this:

> "* * * substitutes for the simple action of damages authorized by the Act a proceeding to restore equality of terms among competitors where it had been denied and to recover a penalty, since three times the sum necessary to restore equality is recovered." (R. 113). "* * * if the action for damages authorized by the Act was intended as a means of establishing proportionate equality where discrimination had existed among competitors in the past, a provision for threefold recovery not only prevents that result, but makes of the Act an instrument for creating the discrimination which Congress sought to prevent.
>
> "Obviously under the interpretation of the Act which is made in the majority opinion, the victim of an il-

legal discrimination may not be permitted to recover more than a sum sufficient to place him on terms of proportionate equality with his competitor. The result of such a recovery would be to substitute one violation of the Act for another. And such is the result of the present decision. Blass, the supposed victim of an illegal discrimination, now becomes the very definite beneficiary of it, while Cohn, the former beneficiary, is now the certain victim; and Arden reimburses Blass for damages to its business or property which it never sustained." (R. 113-114).

In the Pennsylvania Railroad case, it was urged in this Court that when the Railroad violated the Act, the result was to deprive the plaintiff of its statutory right to equality of charges and that the shipper was entitled to recover "such an amount as would put the plaintiff upon the basis of equality of charges assured to it by Sec. 2." (Opinion, p. 193). This Court said that instead of compensating plaintiff for losses sustained, this would have given the plaintiff a profit on the defendant's violation of the law, and hence would have made of it an advantage rather than an injury. (Opinion, p. 205).

Petitioner believes the same principle to be applicable here. The statute involved in the case at bar, and the statute involved in the Pennsylvania Railroad case, each have the same fundamental purpose. One involves unlawful discrimination by seller between buyers, and the other involves unlawful discriminations by carriers against shippers. Denial of presumptive damages would not weaken the enforcement of either Act. Each contains provisions for criminal sanctions and for intervention by a quasi-judicial tribunal, and Congress no doubt deemed that the remedies specifically named in the Act would be sufficient without the addition of a presumptive measure of damages.

The holding of the Circuit Court of Appeals that the amount of the alleged discrimination was in the nature of general damage because the cost of the operation of Respondent's cosmetic department would have been correspondingly less is also contrary to the holding of this

Court in *Interstate Commerce Commission* v. *U. S. ex rel. Campbell, et al.*, 289 U.S. 385; 53 S. Ct. 524; 77 L. Ed. 1467, where the suit was also by a shipper for damages because of discrimination. Denying damages, this Court said:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper." Citing cases. (Opinion, p. 389)
>
> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others paid less." (Opinion, p. 390)

As to the amount paid the favored shipper, the Court said:

> "That was gain to them but it was not loss to the complainants." (Opinion, p. 392)

True, Respondent would have been $10 a week better off had it received $20 a week. But that is not the question. And because the alleged discrimination was not and could not be translated into a competitive weapon, the payment of $20 to Cohn was a gain to it but not a loss to Respondent. Finally, had Petitioner ceased making any allowance to Cohn, Respondent would have been in no position to complain.

The opinion of the Circuit Court of Appeals distinguished the two cases from this Court which we have cited, upon the basis that the sole ground of their decision was that even though a carrier had committed one illegal act, Congress did not intend that it should be compelled or permitted to commit another. (R. 108-110) But if it is the policy of the Robinson-Patman Act to require proportionate equality, that result is defeated by calling the amount of the alleged discrimination general damage and then tripling it.

POINT 6.

The Court Erred in Holding That "Proportionate Equality" was Lacking to the Extent of $10 Per Week.

The allowance of $10 a week assumes Respondent would have been entitled to $20 a week had it received propor-

tionate equality with its competitor, Cohn. We have previously quoted that part of the Court's opinion to the effect that the Act demands proportionate equality, and the law in an action for general damages should compel a violator to restore proportionate equality. It is respectfully submitted that $10 a week for 101 weeks tips the scales too much in Respondent's favor. The portions of the Act in question demand proportionate equality, not identical treatment. As we have shown, throughout the calendar year 1939 and through August of 1940, Respondent got much the best of it. What was lacking in proportionate equality was against the competitor, Cohn, and in favor of Respondent. For 1938 the decision depends upon whether the Court will view the transaction beginning with August, or as of August to Respondent and the entire calendar year as to its competitor Cohn.

If the entire period of operation from August, 1938, through August, 1940, be viewed as one and the separate calendar years be ignored, then it is mathematically certain that Respondent purchased 37.6% of the total merchandise and received 33⅓% of the total fund paid for demonstration. The result reached by the majority of the Circuit Court of Appeals must be upon the assumption Respondent bought 50% of the total purchases, but received 33⅓% of the total fund paid for demonstration. If it be held that the Act was violated for the entire period, viewed as one entity, is it not true that the most that could be said is that Respondent should have received 37.6% of the total amount paid for demonstration? The difference between that and the percent which Respondent did receive is 4.3. For the 101 weeks Blass received $10, aggregating $1,010, and Cohn received $20, aggregating $2,020. The total demonstration paid both was $3,030. 4.3% of that sum accounts to $130.29, representing the amount in dollars and cents that proportionate equality was lacking if the entire period of operation be viewed as one.

On the other hand, if Petitioner be liable at the rate of $10 per week for the period of Respondent's operation in 1938

from August on, 24 weeks would be involved, making a total of $240.

But for the reasons hereinabove assigned, Petitioner urges that it did not violate the sections of the Robinson-Patman Act in question, and that it has no liability to Respondent.

CONCLUSION.

The decision in this case is of far-reaching importance. Matters are presented involving sections of an important statute which have not been construed by themselves. There is urgent need for the authoritative decision of this Court upon those questions.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ELIZABETH ARDEN SALES CORPORATION,
Petitioner and Appellant Below,

v. No. 542

GUS BLASS COMPANY ..... *Respondent and Appellee Below.*

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

I.

THE FEDERAL QUESTION INVOLVED IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY ISSUANCE OF THE WRIT.

The question of federal law decided by the Circuit Court of Appeals is not of sufficient importance to justify issuance of the writ. A comparatively small amount of money is involved. The merchandising practice upon which the action was founded has been denounced by the Federal Trade Commission as violating Subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

> The Matter of Elizabeth Arden, Inc., *et al.*, Docket No. 3133, decided by the Federal Trade Commission October 3, 1944.

There is no showing that the unlawful practice disclosed by this record is being continued by petitioner or

any other manufacturer or distributor. It cannot be assumed, therefore, that similar cases will arise in the future.

In the period of more than nine years since the Robinson-Patman Act became law no similar action has been brought. We have been unable to find any other reported case of an action by a retailer against a manufacturer or jobber alleging violations of Subsections (d) and (e) of the Act.

The question of federal law involved is not, therefore, an important one at this time. It is not one involving a practice as widespread as the basing point system of freight charges involved in

> *Corn Products Refining Co.* v. *Federal Trade Commission,* ..... U. S. ....., 65 S. Ct. 961, decided April 23, 1945, and
>
> *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* ..... U. S. ....., 65 S. Ct. 971, decided April 23, 1945.

This case was not fully developed by petitioner in the district court. Only one witness was produced by it. He was not familiar with petitioner's method of making service allowances.

We assume that the case before the Federal Trade Commission was fully developed. If so, petitioner, by appeal from that order, can present a better record in this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CORRECT.

We will not burden the court with a lengthy argument on the merits. All the questions raised in petitioner's brief are completely answered in the majority opinion.

The essential facts as to the violation of the Robinson-Patman Act are not undisputed, as stated by petitioner on page 2 of its brief. The petitioner failed to produce any witness familiar with its practices. Petitioner's witness, Brophy, undertook to state its policy of allowing demon-

strators' salaries. On cross-examination, however, he admitted that petitioner made an individual trade with each customer; that he was merely a salesman and knew nothing about how those trades were made (R. 65).

Petitioner did not produce or explain its failure to produce Mr. Joseph A. Danilek, comptroller of the company, Mr. Harry T. Johnson, its general manager at the time the agreement with the respondent was made, Miss Mills, who was sales manager succeeding Mr. Carlson, Mrs. Charles H. Mooney, its present sales manager, or Mr. D. H. Sterling, its assistant sales manager. Mr. Brophy testified that Mr. Carlson was in the army, but no reason was given for petitioner's failure to call the other witnesses or take their depositions (R. 53, 54).

The failure to call a witness raises the presumption that his testimony would be unfavorable.

> *Interstate Circuit* v. *United States*, 306 U. S. 208, 225, and cases cited therein.

The record shows that the respondent had a larger, more modern store than the Cohn Company, in whose favor petitioner discriminated. The discrimination began at the inception of the dealings between the parties. It continued throughout the period under consideration. Petitioner failed to prove that it would have treated respondent with proportionate equality under any circumstances.

The figures on pages 16 and 17 of petitioner's brief are misleading for the following reasons:

1. In the year 1938 they compare respondent's purchases for five months with the Cohn Company's purchases for the entire calendar year. The Cohn Company purchased only $3,834.83 for the period from August 1, 1938, to January 1, 1939.

2. If the calculations had been made on a fiscal year basis, the year August, 1938, to July, 1939, would show: Respondent's purchases, $7,086.86 (R. 42); Cohn Company's purchases, $7,575.82 (R. 69).

3. The figures used could not be determined in advance. The calculations are, therefore, an attempt to justify a pre-existing discrimination.

4. The percentage calculations are based on similarly unfair premises.

It must be remembered that the Cohn Company had handled petitioner's products for years and had an established trade therein. Petitioner's line was new with the respondent. A new purchaser could never claim equality with an old one if discrimination on that ground is justified. The act permits of no such discrimination. It cannot be read into the words "proportionate equality."

The petitioner had a fully advertised and well-known quantity differential. It allowed a discount of 33⅓% plus 5% from its fixed retail price to customers purchasing less than $7,500 per year (Admission of fact 4, R. 7).

Customers of petitioner purchasing more than $7,500 net at retail from petitioner in any calendar year received a discount of 40% from the stated retail price (Admission of fact 5, R. 7).

33⅓% plus 5% is equivalent to 36⅔%. It will thus be seen that an additional discount of 3⅓% was allowed to quantity purchasers.

The basis of justification for the present discrimination has never been disclosed by petitioner. It offered an explanation, but the record shows that the formula suggested was never used by it.

The dissenting judge in the Circuit Court of Appeals argues that the threefold recovery permitted respondent discriminates against the Cohn Company. We submit that his reasoning is fallacious because:

1. The threefold recovery is a penalty. It is intended as a deterrent to violations.

2. The Cohn Company, being a party to the discrimination, is not entitled to ultimate equality. Knowingly to induce or receive a discrimination in price is prohibited by Subsection (f).

We believe the petitioner's arguments on the question of damages are fully answered in the majority opinion of the Circuit Court of Appeals (R. 108-112).

Respectfully submitted,

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